

REC'D AUG 29 REC'D

Name: Michael R. Jones

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District Court

APPLICATION

PERSONAL

1. Full Name	Michael R. Jones			
2. County of Residence	Santa Fe			
3. Birthplace	Wauseon, Ohio			
4. If born outside the US, give the basis for your citizenship				
5. Birth Date	[REDACTED] 1970			
6. Marital Status	Married			
7. If married, list spouse's full name	Kristin D. Jones			
8. Spouse's occupation	Behavioral Health Manager with the Children, Youth and Families Department's Behavioral Health Services Division			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No such conflicts exist				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
July 2002	1066 Highland Way	Santa Fe	NM	87507

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Ayersville High School, Defiance, Ohio, 1985 to 1989, High School Diploma
College(s)	Miami University, Oxford, Ohio, 1989 to 1993, Bachelor of Arts
Law School(s)	University of Toledo College of Law, Toledo, Ohio 1993 to 1996, Juris Doctor

12. Bar Admissions and Dates	New Mexico, October 1996 Ohio, May 1997 Federal District Court, District of New Mexico, February 2003 Tenth District Court of Appeals, February 2003
------------------------------	---

EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	April 2005 until present
Employer	Clark, Jones and Pennington, LLC

Mailing Address	432 Galisteo Street, Santa Fe, NM 87501
Business Phone	(505) 820-1825
Position	Partner
Duties	Represent clients in civil, criminal and family law matters. Share in the business management of the law office.
Supervisor	Not Applicable
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	1998, 1999, 2004, 2005 and 2006 Legislative Sessions
Employer	New Mexico Legislature (the Senate)
Mailing Address	Room 115, State Capitol, Santa Fe, NM 87501
Business Phone	(505) 986-4714
Business FAX	(505) 986-4280
Employer's Email Address	
Position	Chief Analyst for the New Mexico State Senate Majority Pool Analysts in 2005 and 2006, Analyst for the Senate Conservation Committee in 1998 and Analyst for the Senate Judiciary Committee in 1999 and 2004.
Dates of Employment	April 2003 through November 2004
Employer	Huffaker & Conway, P.C.
Mailing Address	P.O. Box 1868, Santa Fe, NM 87504
Business Phone	(505) 988-8921
Business FAX	
Employer's Email Address	
Position	Associate Attorney
Dates of Employment	November 2002 through April 2003
Employer	New Mexico Attorney General's Office, Civil Litigation Division
Mailing Address	P.O. Drawer 1508, Santa Fe, NM 87504
Business Phone	(505) 827-6000
Business FAX	(505) 827-5826
Employer's Email Address	
Position	Assistant Attorney General
Dates of Employment	April 1999 to October 2002
Employer	First Judicial District Attorney's Office
Mailing Address	P.O. Box 2041, Santa Fe, NM 87501
Business Phone	(505) 827-5000
Business FAX	(505) 827-5076
Employer's Email Address	
Position	Started as an Assistant District Attorney and ended as a Senior Trial Prosecutor
Dates of Employment	April 1998 to April 1999
Employer	Eleventh Judicial District Attorney's Office Division 1
Mailing Address	335 S. Miller Avenue, Farmington, NM 87401

Business Phone	(505) 599-9810
Business FAX	(505) 599-9822
Employer's Email Address	
Position	Assistant District Attorney
Dates of Employment	January 1997 to December 1997
Employer	New Mexico Supreme Court, Justice Patricio M. Serna
Mailing Address	237 Don Gaspar Avenue, Santa Fe, NM 87501
Business Phone	(505) 827-4860
Business FAX	(505) 827-4837
Employer's Email Address	
Position	Law Clerk
Dates of Employment	Summers of 1994, 1995 and 1996 through October 1996
Employer	Philmont Scout Ranch
Mailing Address	17 Deer Run Road, Cimarron, NM 87714
Business Phone	(575) 376-2281
Business FAX	(575) 376-2602
Employer's Email Address	
Position	Wrangler
Dates of Employment	January to June 1996
Employer	City of Napoleon, Ohio and University of Toledo Law School Clinic
Mailing Address	P.O. Box 151, Napoleon, OH 43545
Business Phone	(419) 592-3503
Business FAX	(419) 592-4723
Employer's Email Address	
Position	Student prosecutor intern in law school clinic program. After law school I worked as a legal assistant performing legal research for the Napoleon City Attorney's office.
Dates of Employment	January to May 1995
Employer	The Honorable Peter Handwork, Ohio Sixth District Court of Appeals
Mailing Address	One Constitution Ave., Toledo, OH 43604
Business Phone	(419) 213-4755
Business FAX	(419) 213-4844
Employer's Email Address	
Position	Judicial Intern through the University of Toledo Law School
Dates of Employment	November 1994 through January 1995
Employer	Toledo Legal Aid Society
Mailing Address	520 Madison Ave., Ste 640, Toledo, OH
Business Phone	(419) 724-0030
Business FAX	(419) 321-1582
Employer's Email Address	

Position	Law Student Intern
----------	--------------------

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15: Thomas M. Clark and Elden A. Pennington, current partners. Former partners Bennett J. Baur, John T. Grubestic. Former associate Matt Cantou Clarke

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: I have worked as a plaintiff's attorney in personal injury cases. This experience has been through the beginning of such matters through settlement. I have had deposition and motions practice experience in such matters.

17. How extensive is your experience in Commercial Law?

Answer 17: I have worked in Commercial Law both as an associate attorney and in my current practice. As an associate attorney with a former employer, I assisted in contract disputes, environmental litigation and class actions. Many of those clients were corporations. In my current practice, I have been involved with contract disputes, home foreclosure, landlord-tenant issues and business formations for individuals and small businesses. Additionally, I worked as contract general counsel with the New Mexico Economic Development Department in the fall of 2006 and winter of 2007. I have also assisted people in preparing wills and navigating the probate process.

18. How extensive is your experience in Domestic Relations Law?

Answer 18: Since 2005, I have handled many domestic relations cases in my practice. I also contracted with the Peacekeepers Domestic Violence Program of the Eight Northern Pueblos from 2005 until February 2012. While working with Peacekeepers, my cases involved survivors of domestic violence who needed assistance in obtaining restraining orders, divorces, alimony and determinations of child custody and support. These cases occurred in both New Mexico courts and the tribal courts of the Eight Northern Pueblos. I have handled divorces, restraining orders, grandparent rights cases, guardianships and child custody and support cases through my firm in the First Judicial District. I have also represented people facing contempt sanctions by the court for failing to abide by court orders in domestic relations cases.

19. How extensive is your experience in Juvenile Law?

Answer 19: As an assistant district attorney, I prosecuted juvenile offenders. I have represented juveniles in delinquency proceedings and juvenile offenders charged as adults. I have also been a guardian ad litem for several juveniles.

20. How extensive is your experience in Criminal Law?

Answer 20: The majority of my practice and experience has been in criminal law. I was an assistant district attorney in the First and Eleventh Judicial Districts. As an assistant district attorney I prosecuted juveniles, worthless check cases, misdemeanor DWI, misdemeanor domestic violence cases, and all levels of felonies up to and including homicide. I have presented cases to the grand jury and seen their completion through trial or plea. I have also prosecuted misdemeanors as an assistant city attorney or contract attorney for the cities of Espanola and Santa Fe. In private practice, I have represented clients facing misdemeanors in magistrate and municipal courts and all levels of felonies up to and including homicide in district court. Many of the criminal cases I have litigated over the years have been through

contract with the Public Defender Department. I also volunteer with the First Judicial District Court's Drug and Treatment Court in Santa Fe.

21. How extensive is your experience in Appellate Law?

Answer 21: I was a law clerk for Justice Patricio M. Serna at the New Mexico Supreme Court and a student law clerk intern for the Ohio Sixth District Court of Appeals. I have handled de novo appeals from municipal and magistrate courts to district court. I have written docketing statements in felony criminal appeals. I have handled administrative appeals from the Motor Vehicle Division to the district court.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: I have tried at least seventeen criminal cases to a jury. Within the last two years I have tried two criminal cases to a jury, a DWI and a felony with charges including battery upon a police officer, assault upon a peace officer, criminal damage to property, drug possession, and resisting an officer. I have also picked several criminal juries that were pled or dismissed after evidentiary hearings and jury selection but prior to the start of trial. I have not tried any civil cases to a jury.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: I have tried over twenty cases without a jury. In the last two years I have tried three criminal trials without a jury. Over the years I have represented civil clients in order to show cause hearings, domestic violence and non-domestic violence restraining order hearings, DWI revocation hearings, family law interim and child support hearings and civil commitment hearings. In criminal matters I regularly try various motions hearings including identification issues, suppression issues and other evidentiary issues. My practice over the years has allowed me participate in court hearings involving evidentiary matters on a regular basis.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: I have written two criminal appeal docketing statement to the Court of Appeals. I have handled at least ten de novo criminal appeals from magistrate or municipal court to district court. I have had one license revocation appeal from the Motor Vehicle Division to the District Court.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates

Public Office	Dates
None	

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
New Mexico Criminal Defense Lawyer's Association	Member	2006 to 2010
Trial Practice section of the New Mexico State Bar	Member	2006 to 2010
Oliver Seth Inn of Court	Member	2004 to present

27. Activities in civic organizations, including offices, held, for last 10 years

Civic Organization	Position Held	Dates
Fairway Village Homeowners'	Vice President	June 2005 to 2011

Association	President	June 2013 to June 2015
Philmont Staff Association	Member	2002 to present

28. Avocational interests and hobbies

Answer 28: Camping, hiking, horseback riding and hunting

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.

Answer 29: No

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify

Answer 30: No

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

Answer 31: No

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: No

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

Answer 33: No

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).

Answer 34: Yes, I was the personal representative for a deceased minor in a wrongful death case.

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

Answer 35: No

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?

Answer 36: I have not been a judge before so this question is not applicable.

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: I have not been a judge before so this question is not applicable.

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: I am a partner in the law firm of Clark, Jones and Pennington. I am a shareholder in the LLC

of Brickhouse Investments, LLC.

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: Rule 21-202, NMRA 2017 (Impartiality and Fairness) could cause a conflict if my current law partners were to have a client appearing before me. In this situation, I would recuse myself from their case. I have represented hundreds of people over the years. If a former client appeared before me, I would take the necessary action to make sure there is no appearance of bias or prejudice on my part pursuant to Rule 21-203(A).

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: I meet the qualifications for the office of district court judge because I am forty-seven years old, have practiced law in New Mexico for the past twenty years and have resided in Santa Fe County within the First Judicial District since 1999.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43: I am applying for this judicial position because I possess the experience, talent and temperament that are crucial to a judge. My varied law practice and extensive courtroom experience have given me the experience I will need as judge. As a district court judge, I will be able to use the skills and experience I obtained as a lawyer to help others in the community.

I have practiced law in New Mexico my entire legal career. During that time I have had a diverse practice with clients including criminal clients, juveniles, corporations, individuals, the State of New Mexico and land grant members. These clients and their cases have given me the opportunity to become well versed in the rules of evidence, civil and criminal procedures. This variety of experience will allow me evaluate, examine and decide any type of case that a judge will hear.

My legal career has given me a deep understanding of how the law impacts people's lives. In my criminal practice, I have observed how a person's actions have repercussions not only to themselves, but also to the victims of their crimes and the families of all those involved. Working with clients in civil cases has demonstrated how important it is to allow people to have the opportunity to have their issues and concerns heard by the courts. Knowing that a judge is willing to hear their case can help litigants to resolve matters on their own. If parties cannot resolve their issues, a prompt, reasoned decision by the judge allows the parties to move forward in their cases and their lives. From these experiences I have gained an understanding of the law that will allow me to make fair decisions in all matters.

In my criminal practice, I have prosecuted and defended people. As a prosecutor, I was responsible for the prosecution of offenders from initiation of the prosecution to resolution through trial or plea. The prosecution of cases honed my understanding of the rules of evidence and criminal procedure. As a criminal defense lawyer, I have had the opportunity to see how imposition of the law impacts the individual and how to use the law to protect the rights of the accused individual.

With my practice I have also represented clients involved in civil litigation. In my civil practice I have represented clients with contractual issues, tort claims, class actions and family law. My wide variety of practice will allow me to analyze and decide any type of case that comes before the court.

I have also worked with the New Mexico legislature for five sessions as an analyst. As an analyst I

reviewed existing statutes and how proposed changes to them would alter existing law. This work honed my skills in evaluating statutes and case law. My work with the legislature, district, magistrate, municipal courts and tribal courts has given me the experience and skills necessary to be an effective and fair district court judge.

I have practiced in the First Judicial District since 1999. I have represented clients in the magistrate, municipal, and district courts of every county in the First Judicial District. I have also been able to represent clients in the First Judicial District's tribal courts. Through my practice I have gained a thorough understanding of jurisdiction in Indian Country and the interaction of tribal courts with state courts.

Judicial temperament is also crucial to the effectiveness of a district court judge. District court judges interact daily with people who have serious problems and concerns and subsequently are in a heightened emotional state. Being able to courteously and patiently handle upset litigants is an important part of a judge's demeanor. In my practice I routinely deal with upset and worried clients and pro-se opponents. Being patient and willing to listen to individuals in a courteous manner are skills I have sharpened with my practice. These skills have given me a patient and respectful temperament that I believe is crucial to a district court judge.

It is the responsibility of a judge to fairly and impartially apply the relevant law based upon the facts of a case. I believe that in order to be a capable and effective judge, I have to be prepared to work diligently and thoroughly. A thorough understanding of the law and being able to critically analyze statutes and case law are crucial to being a judge. Because of my varied practice over the past twenty years, I possess the requisite knowledge, experience, temperament and analytical ability crucial to a district judge in the First Judicial District.

44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?

Answer 44: Yes

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.

5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s: Michael R. Jones Date: August 27, 2017

STATE OF NEW MEXICO
COUNTY OF RIO ARriba
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff,

vs.

D-101-CR-

Defendant.

**DEFENDANT'S REPLY MOTION TO SUPPRESS SHOW-UP
IDENTIFICATION EVIDENCE**

COMES NOW the Defendant, by and through his attorney, Michael R. Jones, and hereby moves this Court to suppress all identification evidence based upon or made as a result of his being viewed in a show up identification procedure and files his Reply Motion to the State's Response to his initial motion and in reply states:

FACTS

1. A review of the facts added by the State omitted a few details and the Defendant is hereby supplementing the facts as presented by both parties.
2. The State in its Response omitted that when Deputy C first interviewed Mr. R about the alleged burglary of his saws, he only described the people he saw as Mexican Nationals. In Deputy C's report, his last sentence states; "Mr. R was not able to provide a more detailed description(sic) of the suspects." This report was taken the day of the alleged incident.
3. The next day, Detective S in a telephonic interview, spoke with Mr. R. The only additional information obtained about the suspects' descriptions was that they looked "clean cut", the driver was taller than the passenger, they were

young Mexican Nationals and he felt he would recognize them if he saw them again. He gave no further description such as height, weight, age, eye color, hair color, or any other distinguishing features.

4. Deputy C's report also states that Mr. R identifies the jeep as dark brown.

The next day, when Mr. R is interviewed by Detective S, he states that the vehicle was "dark brown or maroon". He also states that the vehicle was faded, had scratches on the door and damage to the headlamp. Two weeks later, after Mr. R is shown a potential suspect vehicle, he writes in his statement that the jeep was "a dark faded maroon". He does not write if he saw if the vehicle was faded, had scratches or damage to the headlamps.

5. After Detective S's interview with Mr. R, he placed a BOLO on the jeep and its occupants. Based on the police reports, this BOLO never was productive in finding any vehicle or persons inside of it. Instead, the Defendant was stopped two weeks later in a vehicle based upon a call from another citizen to the police. The Defendant was a passenger in this vehicle.

6. When the Defendant was arrested, the police did not find any saws in the vehicle. The police never found any of the allegedly stolen saws. Mr. R in his report to Deputy C did not know the make or brand name of two of the saws he states were stolen. Deputy C was unable to find any type of physical evidence such as footprints or fingerprints because of the types of surfaces involved.

7. On January 26, 2006, the Defendant and his co-Defendant were arrested in a maroon jeep. They were taken to the sheriff's department offices and held

there under arrest while Mr. R was contacted. Mr. R came to the sheriff's department where he was first shown the impounded jeep, then the co-Defendant and then the Defendant. The Defendants were each held in separate rooms and viewed by Mr. R through one-way glass. There were no other people in the rooms with the Defendants.

8. The State's only connection of the Defendant to this alleged burglary and larceny is the show up identification of the Defendant by Mr. R.

STANDARD OF REVIEW

This motion is being raised pursuant to the Due Process Rights of the Defendant pursuant to the Sixth and Fourteenth Amendments to the U.S. Constitution and Article II, Section 14 of the New Mexico Constitution, Rule 5-601(C) and (D), NMRA 2017, Rule 11-104, NMRA 2017 and Defendant's Motion for Enlargement of Time to File Pre-Trial Motions.

LEGAL ARGUMENT

The Identification of The Defendant was a Suggestive Show up Identification

Show up identifications by their nature are highly suggestive. The show up identification in this case is highly suggestive because of the following factors. When Mr. R viewed the Defendant it was not out in the field immediately after the alleged burglary but two weeks later when the Defendant is in the custody of the sheriff's department. The Defendant was viewed through one-way glass while in custody in the sheriff's department office. The Defendant was identified by the witness after the witness was shown the alleged vehicle and then the alleged co-defendant. This process does not increase the reliability of the show up identification process but increases the

suggestiveness of the identification. Such show-up procedure is inherently suggestive and should be avoided. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 21, 130 N.M. 179, 21 P.3d 1032. In *Patterson*, the N.M. Supreme Court found that spotlighting a defendant caused the identification to be suggestive. *Id.* at ¶ 21, 184, 1037. Spotlighting is an action very similar to isolating a suspect in a room by himself as occurred in this case.

In *State v. Johnson*, 2004-NMCA-058, 135 N.M. 567, 92 P.3d 13, the police identified a defendant through a show up immediately after the witnesses had identified a vehicle they saw involved in a crime. The witnesses were shown the vehicle they recognized then immediately the defendant was brought out of a building by police and shown to the witnesses. The court in *Johnson* was concerned that the sequence of seeing the vehicle and then a suspect was highly suggestive. *Id.* at 16. Such a sequence nearly matches the sequence of events in this case.

Due process under both the State and New Mexico Constitution requires that show up identification be reliable under the totality of the circumstances to be admissible. Because of the suggestiveness of the show up identification, the Defendant's due process rights under the Federal and State Constitutions have been violated.

Because of the suggestiveness of show up identifications, they should be avoided. *Johnson* at ¶ 14. However, once the show up identification has been noted, the court must ask whether there are sufficient indicia of reliability to outweigh the suggestiveness of the procedure followed in this case pursuant to the factors found in *Manson v. Brathwaite*, 432 U.S. 98, 113-14, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 196, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); and *Patterson v. Lemaster*. 2001-NMSC-013, ¶ 21, 21 P.3d 1032. The State has not given sufficient information to

show that the suggestiveness in the show up was overcome by significant indicia of reliability of the factors found in the above cases. These reliability factors are (1) the opportunity the witness had to view the perpetrator at the time of the incident; (2) the witness's degree of attention at the time of the incident; (3) the accuracy of the witness's pre-identification description; (4) the certainty of the witness; and (5) the time between the crime and the identification. Manson, 432 U.S. at 114; Neil, 409 U.S. at 199; State v. Cheadle, 1983-NMSC-093, ¶ 4, 101 N.M. 282, 681 P.2d 708.

The State has not shown how the first factor of reliability, viewing opportunity, was sufficient to weigh against suggestiveness. The defendant was viewed by the eyewitness from his car and while the defendant was seated in another car or getting into it. The witness followed the car and ultimately lost track of the car and its occupants after following it. Following a vehicle and trying to get an identification of its occupants is a trying activity. The witness saw people getting into a vehicle and as they drove away from him. His view of the people would be restricted by his and their vehicles. How and where he saw the people in the car limited the opportunity to view the Defendant. The witness does not say how clear of a view he had of the defendants. Because of the limited view he had, this factor is not indicative of reliability of the show up identification.

The State in its response makes an issue that the witness viewed his property inside the vehicle which he saw leaving the property. The witness may have seen saws that looked like his in the back of the vehicle. However, no such saws were ever recovered from the defendant. In addition, the witness in his report to the police is not

even able to identify the make or brand name of two of the three saws he claims were stolen from him.

The next factor to be examined is the witness's degree of attention at the time of the crime. Regarding the witness's degree of attention, the incident took during the day as he passed a vehicle leaving his driveway and as he chased the vehicle. Because the incident happened so quickly, it is highly unlikely that the witness was paying close attention to the people he saw. It is also relevant that the witness may not have been paying attention to the people if he was focused on the items in the back of the jeep leaving his property. As he passed a vehicle and saw his items in its back, he would have already missed the opportunity to see the face of the suspects. In contrast to *State v. Stampley*, 1999-NMSC-027, ¶ 14, 127 N.M. 426, 982 P.2d 477, the witnesses saw a person running at them and later picked that person out of a photographic lineup, not in a show up. Because of these problems in how the witness would have seen the suspects, this second factor is not an indicia of reliability.

The description of the suspects in this matter is very limited. Mr. R's initial description is of "Mexican Nationals" in a dark brown jeep four door and he did not provide more information. The next day he allegedly gave a more "detailed" description. After a day of considering what had happened, the additional description given by Mr. R is split between the jeep and the people. The description of the people is that of young "Mexican Nationals" who are clean cut and that the driver was taller than the passenger. The description of the jeep changed to dark brown or maroon, being faded with scratches on the door and damage to the headlamps. While a BOLO of such descriptions was entered by the detectives in this matter, the defendants were not arrested based upon the

BOLO but a call from another citizen. The description of the suspects and their vehicle was very limited. There was no description of age, height, weight, body size, hair color, eye color or any other common identification descriptors. Because of the sketchy description of the suspects, the State cannot show the witness provided a detailed description of the defendants. This factor does not indicate that the show up identification is reliable. *See Patterson* at ¶ 14.

Mr. R's identification of the Defendant occurred after he saw the jeep and co-defendant and while the Defendant was isolated in a room behind a one way mirror. Mr. R did not have the opportunity to view the suspects in a photographic line up or in a lineup with other people who may look like him. Any identification in such circumstances, even immediate identification is not a sufficient indicia of reliability of the show up identification. Thus the State has failed to show how this factor increases the reliability of the show up identification.

There was a two week period between the alleged crime and the show up identification. Most identifications happen within hours if not minutes of an alleged crime. *See Patterson* and *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046. Occasionally, longer times may elapse. *See State v. Johnson*, at ¶ 25. When a long period of time elapses, the time should be counted against reliability unless some other item would suggest that time was not a factor. There is no such item found in the evidence of this matter. Thus, the extended length of time should count against reliability of the identification.

For the reasons stated in the initial motion and this reply, the State cannot show that the show up was not suggestive and the out of court identification and any in court identification of the Defendant should be suppressed in this matter.

Defendant's Motion was Timely

Pursuant to Rules 5-601(C) and (D), NMRA 2017, any pretrial motions may be raised within ninety (90) days of arraignment or later with good cause. Current defense counsel entered his appearance on April 10, 2017. Included within that entry was a motion to enlarge time to file pretrial motions.

This motion is a pretrial motion under Rule 5-601, NMRA 2017. Initial discovery was not provided until May 18, 2017. Current defense counsel did not have opportunity to be at initial arraignment or exchange information with first defense counsel. It is illogical to expect the defense to know what motions should be filed without discovery. The State in its arguments states that the Defendant's motion should be denied because the motion was not filed within twenty days of receiving discovery. However Rule 5-601(D) allows for ninety days or more with permission of the court to file pretrial motions. Following the State's argument that a pretrial motion should be filed prior within a certain time of discovery, this motion is timely if filed within 90 days of discovery, in this case May 18, 2017. The ninety day limit from discovery being provided to current counsel is August 18, 2017. This motion was filed on July 24, 2017. For the above stated reasons this motion should be considered timely filed.

Under Rule 11-104, NMRA 2017, this is also a motion to review the admissibility of evidence. The admissibility of the show up identification has to be ruled upon by the

Court before the trial can be held. Thus, this motion is a pretrial motion under Rule 5-601 and is still timely for the reasons set out in the prior paragraph.

WHEREFORE, Defendant seeks an order suppressing the State's use at trial of all identification of Defendant based upon the suggestive show-up identification and for such further and necessary relief up to and including dismissal as the Court deems necessary and just in the premises.

Respectfully Submitted,

CLARK, JONES & PENNINGTON, LLC

Michael R. Jones
Attorney for Defendant
432 Galisteo St.
Santa Fe, NM 87501
(505) 820-1825

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was hand delivered/mailed to the District Attorney's Office, on.

REFERENCES

Governor Toney Anaya The Anaya Law Firm, PA 826 Gonzales Rd. Santa Fe, NM 87501 (505) 988-5050	Daniel Marlowe, Esq. The Marlowe Law Firm, PC 1640 Old Pecos Trail, # A Santa Fe, NM 87504 (505) 988-1144
Seth McMillan Montgomery & Andrews, P.A. 325 Paseo de Peralta Santa Fe, NM 87501 (505) 982-4289	Michael J. Moffett, Esq Comeau, Maldegan, Templeman & Indall, LLP 141 E. Palace Ave, # 100 Santa Fe, NM 87504-0669 (505) 982-4611
Jennifer Padgett First Judicial District Attorney's Office 327 Sandoval St. Santa Fe, NM 87501 (505) 699-9120	Honorable Geoffrey Tager Ohkay Owingeh Tribal Court P.O. Box 1128 Ohkay Owingeh Pueblo, NM 87566 (505) 852-4350
Linda Trujillo New Mexico State Representative, District 48 Walsh, Gallegos, Trevino, Russo & Kyle, P.C. 500 Marquette Ave NW # 1360 Albuquerque, NM 87102 (505) 243-6864	Eloy Vigil Former client 1024 State Road 503 Cundiyo, NM 87522 (505) 351-4788